Supreme Court, U.S.
FILED

166

No. 10-140 JUL 27 2010

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In the
Supreme Court of the United States

JOSEPH CAREY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 22, 2010

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QUESTION PRESENTED

Whether the Sixth Circuit erred by refusing to remand Petitioner's expungement petition to the district court, which denied it solely because it concluded "there is no federal provision for expungement of a valid conviction," when the Sixth Circuit held, to the contrary, that there is a federal provision for expungement of a valid conviction and that the district court had jurisdiction to hear such a petition.

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OPINIONS BELOW

The decision of the court of appeals is reported at 602 F.3d 738, and is reproduced in the Appendix at 1a. The order of the U.S. District Court for the Northern District of Ohio is not officially reported but it is reproduced in the Appendix at 9a.

JURISDICTION

The judgment of the court of appeals was issued on April 19, 2010. Pet. App. 1a. Petitioner's timely petition for panel rehearing was denied on May 17, 2010. Pet. App. 11a. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SECOND AMENDMENT

> A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.

FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness

> against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

18 U.S.C. §921(a)(20)

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

STATEMENT OF THE CASE

Joseph Carey was convicted in the United States District Court for the Northern District of Ohio of gambling, a felony, and, because of the Federal Gun Control Act, lost his right to bear arms. After completing his sentence, he petitioned the court to have his gambling conviction expunged. He contended that, as a matter of due process and equal protection under the Fifth Amendment, he should be heard on his claim that he should not be permanently barred from exercising the right to bear arms under the Second Amendment. Without reaching the merits of his claim, the district court concluded, "There is no federal provision for expungement of a valid conviction," and denied his petition.

On appeal, the Sixth Circuit held to the contrary. The court reasoned that a district court may expunge a valid conviction under its equitable jurisdiction because Section 921 of the Federal Gun Control Act recognizes that even valid convictions can be expunged.[1] Nevertheless, rather than reverse for a determination on the merits, the Sixth Circuit affirmed the district court's denial of Carey's petition.

The basis of federal jurisdiction in the district court was 28 U.S.C. §1331.

ARGUMENT

Carey does not dispute that convicted felons, like him, should be deprived of the constitutional right to bear arms, but not necessarily for the rest of their lives. Congress agreed: The Federal Gun Control Act,

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[1] The circuits are divided over whether district courts have equitable jurisdiction to hear expungement requests and, if they do, to what extent that jurisdiction may be exercised to expunge a valid conviction. Like the Sixth Circuit, the Second, Seventh, Tenth and D.C. Circuits have concluded that they do have equitable jurisdiction to hear expungement claims, but unlike the Sixth Circuit, they have not yet addressed whether Section 921(a)(20) provides for the expungement of a valid conviction. See. *United States v. Schnitzer, 567 F.2d 536 (2d Cir. 1977)*; *United States v. Flowers, 389 F.3d 737, 739 (7th Cir. 2004)*, *United States v. Linn, 513 F.2d 925 (10th Cir. 1975)*, *Livingston v. United States Dep't of Justice, 245 U.S. App. D.C. 54, 759 F.2d 74, 78 (D.C. Cir. 1985)*. The First, Third, Eighth and Ninth Circuits have concluded that they do not have such equitable jurisdiction. See *United States v. Coloian, 480 F.3d 47 (1st Cir. 2007), cert. den. Coloian v. United States, 128 S.Ct. 377 (2007)*; *United States v. Dunegan, 251 F.3d 477, 478 (3rd Cir. 2001)*, *United States v. Meyer, 439 F.3d 855 (8th Cir. 2006)*; *United States v. Sumner, 226 F.3d 1005 (9th Cir. 2000)*.

which took his Second Amendment right away, would restore it to him if his conviction were expunged.

The Sixth Circuit held that a district court has jurisdiction to hear on the merits a claim to expunge a valid conviction. Carey therefore contends that the order of the district court should have been reversed, not affirmed because the district court concluded that it did not have jurisdiction when the Sixth Circuit held, to the contrary, that it did.[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] Petitioner's contention that the Sixth Circuit's conclusion is inconsistent with its opinion is echoed in an Internet posting, "Taking the Fifth-A Criminal Law Blog," http://takingthefifth-acriminallawblog.com/2010/04/26/sixth-circuit-errs-in-denying-expungement-of-gambling-conviction/. Pet. App. 13a.

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 10a0107p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-3399

[Filed April 19, 2010]

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	)
v.	)
JOSEPH A. CAREY, *Defendant-Appellant*.	)

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 03-00446-001—Dan A. Polster, District Judge.

Argued: March 11, 2010

Decided and Filed: April 19, 2010

Before: MARTIN and GIBBONS, Circuit Judges; MARBLEY, District Judge.*

COUNSEL

ARGUED: William L. Tabac, LAW OFFICE, Parkman, Ohio, for Appellant. Bernard A. Smith, ASSISTANT UNITED STATES ATTORNEY, Akron, Ohio, for Appellee.
ON BRIEF: William L. Tabac, LAW OFFICE, Parkman, Ohio, for Appellant. Bernard A. Smith, ASSISTANT UNITED STATES ATTORNEY, Akron, Ohio, for Appellee.

OPINION

MARBLEY, District Judge. Defendant-Appellant Joseph Carey ("Carey") appeals the decision of the district court to deny his "Petition for Order of Expunction of a Conviction" (construed by the district court as a Motion for Expungement). Carey concedes that the Supreme Court, in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), specifically upheld firearm prohibitions for felons. Carey further concedes that his request is to expunge a valid conviction and that this Court has previously indicated that there must be compelling and extraordinary circumstances for a Court to grant such a motion. For the following

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*The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

reasons, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

On November 24, 2003, Carey was charged with one count of conducting an illegal gambling business in violation of 18 U.S.C. § 1955. On December 12, 2003, Carey entered a guilty plea to the Information pursuant to a plea agreement. The plea agreement contained a waiver of any appellate and collateral attack rights as to his conviction or sentence, and the district judge included the waiver and its consequences in his colloquy with Carey. The district judge sentenced Carey to one year of probation, a $10,000 fine, and a $100 special assessment. Carey has not appealed his conviction, takes full responsibility for the underlying offense, and has since conformed his conduct to the law. On March 18, 2009, Carey moved the district court for an order to expunge his conviction. Two days later, and prior to the government's response, the district court denied his motion on the grounds that "[t]here is no federal provision for expungement of a valid conviction." *United States v. Carey*, No. 1:03-cr-00446 (N.D. Ohio Mar. 20, 2009) (Polster, J.). Carey timely filed this appeal.

II. JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Carey raised constitutional claims in support of his Motion for Expungement. This Court has jurisdiction under 28 U.S.C. § 1291 to review the final decision of the district court on Carey's motion for expungement.

III. ANALYSIS

A. Waiver of Collateral Attack

1. Standard of Review

This Court reviews the question of whether a defendant waived his rights in a valid plea agreement *de novo*. *United States v. Swanberg*, 370 F.3d 622, 626 (6th Cir. 2004). The district court did not rule on the plea agreement, as it dismissed the motion for expungement solely on the merits.

2. Expungement as a Collateral Attack

The United States argues that Carey's appeal should be denied because his motion for expungement is equivalent to a collateral attack of his conviction, and that he waived his right to any collateral attacks in his plea agreement. The government relies solely on *United States v. Crowell*, 374 F.3d 790 (9th Cir. 2004), to support its argument that a motion for expungement of a conviction is a collateral attack of a conviction. In *Crowell*, however, the Ninth Circuit held that an "expungement, without more, does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty." *Id.* at 792. The court went on to find that, in the particular case before it, the defendant was attempting to use "her motion for expungement as a post-conviction vehicle to challenge collaterally the lawfulness of her conviction," and was actually asking the court to vacate her conviction, resulting in the court treating her motion as a collateral attack *instead* of an expungement. *Id.* at 794. In this case, Carey is not attempting to use his

motion for expungement as a post-conviction vehicle, and, in fact, he readily admits the legality of his conviction.

This Court has not previously ruled on whether a motion for expungement is considered a collateral attack on a conviction. The case *sub judice*, however, does not appear to be a case in which the defendant is attempting to find a back door into the court despite having agreed to a waiver. In asking for expungement, Carey does not ask for relief from punishment or to reverse the prosecution against him. *Cf. United States v. Fotouhi*, No. 02-cr-38, 2002 U.S. Dist. LEXIS 14601, at *19 (W.D. Wisc. 2002) (finding that district court has jurisdiction to expunge valid conviction). This Court, therefore, agrees with the reasoning of *Crowell* and finds that a motion for expungement, which is not brought as an attempt to couch a challenge to a conviction, is not considered a collateral attack on that conviction. Accordingly, Carey's motion for expungement was not waived by his plea agreement.

B. Carey's Fifth Amendment Rights

1. Standard of Review

An order on a motion to expunge a conviction is within the equitable jurisdiction of a federal district court. This Court reviews such an order for abuse of discretion. *United States v. Doe*, 556 F.2d 391, 393 (6th Cir. 1977).

2. Substantive Due Process & Equal Protection

Carey argues that the Second Amendment to the United States Constitution gives him a fundamental

right to possess or carry a firearm, and that the denial of his expungement motion for his valid conviction[1] denied him this fundamental right, resulting in a violation of his Equal Protection and Due Process rights under the Fifth Amendment. Essentially, Carey contends that, because expungement of his conviction would allow him to regain his Second Amendment rights, a court's denial of expungement infringes upon his fundamental right.

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[1] Carey devotes a section of his brief to arguing that Congress, through its passage of the Federal Gun Control Act, 18 U.S.C. § 921, et. seq., "intended that its expungement remedy should extend to valid convictions like his [Carey's]." Appellant's Br. at 7 (citing 18 U.S.C. § 921(a)(20)). Carey is correct in his assertion that 18 U.S.C. § 921(a)(20) does not preclude expungements of valid convictions, as it provides that:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20).

Carey is incorrect, however, that this section, or any other section of the statute, creates "an expungement remedy." Section 921(a)(20) does nothing more than to exempt felons with expunged convictions, valid or not, from the prohibitions on the possession of firearms by felons as outlined in 18 U.S.C. § 922(g)(1). No provision in the Federal Gun Control Act, offers guidelines or procedures for whether or when expungement may be appropriate.

In *Heller*, the Supreme Court held that the Second Amendment provides an individual right to bear arms, but cautioned:

> [a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons* and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

128 S. Ct. at 2816-17 (emphasis added). After *Heller*, this Court affirmed that prohibitions on felon possession of firearms do not violate the Second Amendment. *United States v. Frazier*, 314 F. App'x 801 (6th Cir. Nov. 19, 2008). In short, *Heller* states that the Second Amendment right is not unlimited, and, in fact, it is specifically *limited* in the case of felon prohibitions. *Heller*, 128 S. Ct. at 2816-17. Because Congress's prohibition on felon possession of firearms is constitutional, it follows that the burdens associated with the congressionally-created expungement exception in 18 U.S.C. § 921(a)(20) do not violate the Second Amendment.[2] Accordingly, the district court

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[2] Carey styles his claim as a general Due Process or Equal Protection argument. He appears to conflate the enumerated Second Amendment right with Equal Protection and Due Process protections under the Fifth Amendment, without specifying the legal theory under which Equal Protection and Due Process are implicated.

did not abuse its discretion in denying Carey's motion for expungement.

C. District Court Abuse of Discretion

1. Standard of Review

An order on a motion to expunge a conviction is within the equitable jurisdiction of a federal district court. This Court reviews such an order for abuse of discretion. *Doe*, 556 F.2d at 393.

2. Law and Analysis

Carey argues that the district court abused its discretion in denying his motion for expungement without providing him with a hearing on the motion. Carey does not point to, nor has this Court found, any statutory or constitutional authority that requires a hearing on a motion for expungement. Carey does not allege, nor does he have, a Fourteenth Amendment procedural due process claim. *Cf. Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (deprivation of life, liberty, or property will not be effectuated with notice and an opportunity for a hearing). Accordingly, the district court did not abuse its discretion in denying Carey a hearing on his motion or in denying Carey's motion for expungement.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's denial of expungement.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No.: 1:03cr446

[Filed March 20, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
-vs-	)
	)
JOSEPH CAREY,	)
	)
Defendant(s).	)
	)

ORDER

Before the Court is Defendant's Petition for Order of Expunction of a Conviction[1] (ECF #30). There is no federal provision for expungement of a valid conviction. Accordingly, this motion is hereby DENIED.

IT IS SO ORDERED.

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[1] The Court construes this document as a Motion for Expungement, and the Clerk of Court has docketed it as such.

/s/ Dan Aaron Polster 3/20/09
Dan Aaron Polster
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 09-3399

[Filed May 17, 2010]

UNITED STATES OF AMERICA	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
JOSEPH A. CAREY	)
	)
Defendant - Appellant	)
	)

ORDER

BEFORE: MARTIN, Circuit Judge; GIBBONS, Circuit Judge; MARBLEY, U.S. District Judge*;

Upon consideration of the petition for rehearing filed by the appellant,

* The Honorable Algenon L. Marbley, United States District Judges for the Southern District of Ohio, sitting by designation.

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green

Issued: May 17, 2010

APPENDIX D

http://takingthefifth-acriminallawblog.com/2010/04/26/sixth-circuit-errs-in-denying-expungement-of-gambling-conviction/

Taking the Fifth–A Criminal Law Blog

[Author: C. Zadik Shapiro]

- **SIXTH CIRCUIT ERRS IN DENYING EXPUNGEMENT OF GAMBLING CONVICTION**

Posted on April 26th, 2010 zshapiro No comments

Joseph Carey plead guilty to conducting an illegal gambling business in 2003. As a convicted felon he is ineligible to possess a gun. In Heller the Supreme Court specifically excluded convicted felon from those who could possess weapons.

Carey now wants to have a gun. Therefore he moved in the United States District Court to expunge his record. The motion was denied, without a hearing, on the basis that the court did not have jurisdiction.

Carey appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit held that "[a]n order on a motion to expunge a conviction is within the equitable jurisdiction" of the District Court. Therefore the proper action for the Sixth Circuit to take is to return the case to the District Court for it to consider whether or not,

using its equitable jurisdiction it should grant the motion to expunge. But instead the Sixth Circuit affirmed the District Court decision saying that the District Court properly used its discretion in denying Carey a hearing and in denying his motion. The problem is that the District Court never used its discretion in denying the motion since it wrongly decided that it did not have jurisdiction.